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Prisoner Access to Parole Files: A Due Process Anaylsis

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PRISONER ACCESS TO PAROLE FILES: A DUE PROCESS ANALYSIS

INTRODUCTION

Since its inception in 1876 at the Elmira Reformatory in New York,[1] parole[2] has become an integral part of the penalogical system.[3] The importance of the parole system has grown to the point where today, more often than not, the parole board, rather than the sentencing judge, decides how long a prisoner will remain incarcerated.[4] Yet, despite their enormous power, parole boards have typically been afforded broad discretion in determining who is to be granted parole.[5] Because there is neither a constitutional[6] nor statutory[7] right to be granted parole, courts have been reluctant to examine

1. H. Abadinsky, Probation and Parole: Theory and Practice 143 (1977).

2. Parole is the conditional release of a prisoner from a penal institution after he has served part of his sentence. The release is premised upon the belief that a prisoner is able to return to society as a useful citizen. L. Carney, Probation and Parole: Legal and Social Dimensions 154-55 (1977). For an excellent overview of the parole system, see Comment, *The Parole System,* 120 U. Pa. L. Rev. 282 (1971).

Parole should not be confused with probation, which allows the individual to remain free without serving any time in prison. *See* D. Dressler, Practice and Theory of Probation and Parole 16 (2d ed. 1969). Pardon differs from both parole and probation in that the individual is relieved from the legal consequences of the crime he has committed. *See* S. Rubin, The Law of Criminal Correction 665 (2d ed. 1973).

3. Morrissey v. Brewer, 408 U.S. 471, 477 (1972) (citing Note, *Parole Revocation in the Federal System,* 56 Geo. L.J. 705 (1968)).

4. "Parole is the predominant mode of release for prison inmates today, and it is likely to become even more so." L. Carney, *supra* note 2, at 58-59 (quoting National Advisory Comm'n on Criminal Justice Standards and Goals, Task Force Report: Corrections 389 (1973)) [hereinafter cited as Corrections]; *accord,* The Official Report of the New York State Special Commission on Attica 94 (1972) [hereinafter cited as Attica Report]. In 1970, more than 70% of the prisoners discharged from penal institutions were released on parole. L. Carney, *supra* note 2, at 58.

5. Menechino v. Oswald, 430 F.2d 403, 405 (2d Cir. 1970), *cert. denied,* 400 U.S. 1023 (1971). *See also* Boddie v. Weakley, 356 F.2d 242, 243 (4th Cir. 1966); Brown v. Kearney, 355 F.2d 199, 200 (5th Cir. 1966) (per curiam).

6. *See, e.g.,* DiMarco v. Greene, 385 F.2d 556 (6th Cir. 1967); Carson v. Executive Director Dep't of Parole, 292 F.2d 468 (10th Cir. 1961) (per curiam); Simon v. United States, 269 F. Supp. 738 (E.D. La. 1967), *aff'd per curiam,* 397 F.2d 813 (5th Cir. 1968).

7. *See, e.g.,* Buchanan v. Clark, 446 F.2d 1379 (5th Cir.) (per curiam), *cert. denied,* 404 U.S. 929 (1971); Barnes v. United States, 445 F.2d 260 (8th Cir. 1971) (per curiam). Although there is no statutory right to be granted parole, in many jurisdictions a prisoner has a statutory right to be considered for parole after serving a specified portion of his sentence. *See* Ariz. Rev. Stat. § 31-411 (Supp. 1977-1978); Ark. Stat. Ann. § 43-2807 (1977); Cal. Penal Code § 3041 (West Supp. 1978); Fla. Stat. Ann. § 947.16(1) (West Supp. 1978); Idaho Code § 20-223 (Supp. 1978); Ill. Ann. Stat. ch. 38, § 1003-3-3 (Smith-Hurd Supp. 1978); Iowa Code Ann. § 906.5 (West Special Pamphlet 1978); La. Rev. Stat. Ann. § 15:574.4 (West Supp. 1978); Mass. Ann. Laws ch. 127, § 133A (Michie/Law. Co-op 1972 & Supp. 1978); Mich. Comp. Laws Ann. § 791.235 (1968); Neb. Rev. Stat. § 83-1, 110 (1976); N.H. Rev. Stat. Ann. § 651:45 (1974 & Supp. 1977); N.J. Stat. Ann. § 30:4-123.10 (West 1964); N.M. Stat. Ann. § 41-17-24 (1972); N.C. Gen. Stat. § 148-58 (Supp. 1977); N.Y. Correc. Law § 212 (McKinney Supp. 1977-1978); N.D. Cent. Code § 12-59-05 (1976); Ohio Rev. Code Ann. § 2967.13 (Page 1975); Okla. Stat. Ann. tit. 57, § 3327 (West 1969); Pa. Stat. Ann. tit. 61, § 316 (Purdon 1964); R.I. Gen. Laws § 13-8-9 (1970); S.C. Code § 24-21-620 (1976); S.D. Comp. Laws Ann. §§ 23-60-6, -8 to -10 (1967 & Supp. 1977); Tenn. Code Ann. § 40-3612 (1977); Tex. Crim. Pro. Code Ann. tit. 42, § 12C(e) (Vernon 1966 & Supp. 1977); Vt.

the often chaotic administration of parole, despite prisoners' claims that the procedures adopted by parole boards often lead to arbitrary and capricious decisions denying parole.[8]

At the center of this controversy is the parole release hearing—the linchpin of the parole system.[9] A parole release hearing is an interview between a prisoner and representatives of the parole board, after which the board decides whether the prisoner should be granted parole.[10] A procedural issue of crucial interest to both the prisoner and the parole board is the right of a prisoner to review his parole file prior to his scheduled hearing.[11] The prisoner's interest in seeking access to his file is to ensure that the parole board does not base its decision on false or misleading information contained in the file.[12] Parole boards, however, object to prisoner access because of the administrative burden it imposes.[13]

In accord with the general judicial reluctance to interfere with the parole system, the courts have also rejected the requests of prisoners seeking access to their files prior to parole release hearings. A threshold issue is whether the

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Stat. Ann. tit. 28, § 1051 (1970); Va. Code § 53-251 (1974); Wash. Rev. Code Ann. § 9.99.110 (1975); W. Va. Code § 62-12-13 (1977); Wis. Stat. Ann. § 57.06 (West Supp. 1978-1979).

In other jurisdictions, however, when an individual will be considered for parole is at the discretion of the board itself. *See* Ala. Code § 15-22-15 (1975); Alaska Stat. § 33.15.060 (1977); Colo. Rev. Stat. § 17-1-204 (1976); Conn. Gen. Stat. Ann. § 54-125 (West Supp. 1978); Del. Code Ann. tit. 11, § 4346 (1974); D.C. Code Encycl. § 24-204 (West 1967); Ga. Code Ann. § 77-515 (1973); Hawaii Rev. Stat. § 353-68 (1976); Ind. Code Ann. § 11-1-1-9.1 (Burns Supp. 1978); Ky. Rev. Stat. § 439.340 (Supp. 1976); Me. Rev. Stat. Ann. tit. 34, § 1552 (1978); Md. Ann. Code art. 41, § 110 (1978); Minn. Stat. Ann. § 243.05 (West Supp. 1977); Miss. Code Ann. § 47-7-17 (Supp. 1978); Mont. Rev. Codes Ann. § 95-3214 (1970); Nev. Rev. Stat. § 213.120 (1977); Or. Rev. Stat. § 144.050 (1977); Utah Code Ann. § 77-62-9 (1953); Wyo. Stat. § 7-325 (Supp. 1975).

8. S. Rubin, *supra* note 2, at 628-29.

9. *See* pt. I *infra*.

10. Note, *The Applicability of Due Process and State Freedom of Information Acts to Parole Release Hearings*, 27 Syracuse L. Rev. 1011 n.6 (1976).

11. This is of significance only to prisoners in state institutions. In Cooley v. Sigler, 381 F. Supp. 441 (D. Minn. 1974), the court held that a federal prisoner must be given access to his parole files because it "would greatly reduce the presently excessive danger of erroneous factual basis for [parole] decisions". *Id.* at 443 (citation omitted). Subsequently, procedures permitting federal prisoners to inspect their files were adopted pursuant to the Administrative Procedure Act, 5 U.S.C. § 552(a) (1976). *See* note 90 *infra*.

12. *See, e.g.*, Kohlman v. Norton, 380 F. Supp. 1073 (D. Conn. 1974) (parole denied because file erroneously indicated that applicant had used gun in committing robbery); Leonard v. Mississippi Probation & Parole Bd., 373 F. Supp. 699 (N.D. Miss. 1974), *rev'd*, 509 F.2d 820 (5th Cir.), *cert. denied*, 423 U.S. 998 (1975) (prisoner denied parole on the basis of illegal disciplinary action); Masiello v. Norton, 364 F. Supp. 1133 (D. Conn. 1973) (presentence report in parole file contained unsubstantiated assertion that defendant would become connected with organized crime if released on parole); State v. Pohlabel, 61 N.J. Super. 242, 160 A.2d 647 (App. Div. 1960) (presentence report in parole file erroneously stated, *inter alia*, that prisoner had violent tendencies).

13. *See, e.g.*, Franklin v. Shields, 569 F.2d 800 (4th Cir. 1978) (per curiam) (en banc), *aff'g in part and rev'g in part* 569 F.2d 784 (4th Cir. 1977), *cert. denied*, 435 U.S. 1003 (1978); Williams v. Ward, 556 F.2d 1143, 1158-60 (2d Cir.), *cert. dismissed*, 434 U.S. 944 (1977); Holup v. Gates, 544 F.2d 82, 85-86 (2d Cir. 1976), *cert. denied*, 430 U.S. 941 (1977); Cook v. Whiteside, 505 F.2d 32, 34 (5th Cir. 1974).

prisoner has a protectable interest in his release hearing so as to warrant the protection of procedural due process.[14] Unfortunately, the Supreme Court has not addressed this problem and lower courts have reached conflicting results.[15] Even courts holding that due process does apply to the hearing have decided that such application does not require that a prisoner be provided with access to his prison file prior to the hearing.[16] These latter decisions have

14. A prisoner may claim the protection of the due process clause. Screws v. United States, 325 U.S. 91 (1945). A person cannot be denied access to the courts simply because he is a prisoner. Younger v. Gilmore, 404 U.S. 15 (1971), *aff'g* Gilmore v. Lynch, 319 F. Supp. 105 (N.D. Cal. 1970); *Ex parte* Hull, 312 U.S. 546 (1941). Although "[l]awful imprisonment necessarily makes unavailable many [of the] rights and privileges of the ordinary citizen, . . . a prisoner is not wholly stripped of constitutional protections when he is imprisoned for crime." Wolff v. McDonnell, 418 U.S. 539, 555 (1974); *cf.* Cruz v. Beto, 405 U.S. 319 (1972) (prisoners enjoy religious freedom under the first amendment); Lee v. Washington, 263 F. Supp. 327 (1966), *aff'd per curiam,* 390 U.S. 333 (1968) (prisoner protected by equal protection clause from racial discrimination).

15. The Fifth Circuit has consistently held that due process is not applicable to the parole release hearing. Cruz v. Skelton, 543 F.2d 86 (5th Cir. 1976), *cert. denied,* 433 U.S. 911 (1977); Brown v. Lundgren, 528 F.2d 1050 (5th Cir.), *cert. denied,* 429 U.S. 917 (1976); Cook v. Whiteside, 505 F.2d 32 (5th Cir. 1974); Scarpa v. United States Bd. of Parole, 477 F.2d 278 (5th Cir.) (en banc), *vacated and remanded to consider mootness,* 414 U.S. 809 (1973); *accord,* Scott v. Kentucky Parole Bd., No. 74-1899 (6th Cir. Jan. 15, 1975), *vacated and remanded to consider mootness,* 429 U.S. 60 (1976).

A majority of courts, however, have held to the contrary. Franklin v. Shields, 569 F.2d 784 (4th Cir. 1977), *aff'd in part and rev'd in part per curiam on rehearing en banc,* 569 F.2d 800 (4th Cir.), *cert. denied,* 435 U.S. 1003 (1978); Williams v. Ward, 556 F.2d 1143 (2d Cir.), *cert. dismissed,* 434 U.S. 944 (1977); Holup v. Gates, 544 F.2d 82 (2d Cir. 1976), *cert. denied,* 430 U.S. 941 (1977); United States *ex rel.* Richerson v. Wolff, 525 F.2d 797 (7th Cir. 1975), *cert. denied,* 425 U.S. 914 (1976); Haymes v. Regan, 525 F.2d 540 (2d Cir. 1975); Bradford v. Weinstein, 519 F.2d 728 (4th Cir. 1974), *vacated as moot per curiam,* 423 U.S. 147 (1975); Childs v. United States Bd. of Parole, 511 F.2d 1270 (D.C. Cir. 1974); United States *ex rel.* Johnson v. Chairman of N.Y. State Bd. of Parole, 500 F.2d 925 (2d Cir.), *vacated as moot sub nom.* Regan v. Johnson, 419 U.S. 1015 (1974); Cicero v. Olgiati, 410 F. Supp. 1080 (S.D.N.Y. 1976); Soloway v. Weger, 389 F. Supp. 409 (M.D. Pa. 1974); Cooley v. Sigler, 381 F. Supp. 441 (D. Minn. 1974); Johnson v. Heggie, 362 F. Supp. 851 (D. Colo. 1973); United States *ex rel.* Harrison v. Pace, 357 F. Supp. 354 (E.D. Pa. 1973).

Justice Stevens, dissenting from the remand in Scott v. Kentucky Parole Bd., 429 U.S. 60 (1976), noted the importance of this issue as demonstrated by (1) the vast number of parole release decisions made every year, (2) the importance of each decision to the person affected by it, and (3) the extreme amount of litigation with varying results in the federal courts. *Id.* at 61 (Stevens, J., dissenting).

16. Access to parole files has been denied in the following cases: Franklin v. Shields, 569 F.2d 800 (4th Cir. 1978) (per curiam) (en banc), *aff'g in part and rev'g in part* 569 F.2d 784 (4th Cir. 1977), *cert. denied,* 435 U.S. 1003 (1978); Williams v. Ward, 556 F.2d 1143 (2d Cir.), *cert. dismissed,* 434 U.S. 944 (1977). In the federal system, prior to the adoption of procedures allowing prisoners to see their files, *see* note 11 *supra,* it was usually held that a federal prisoner had no right to access. *See* Fisher v. United States, 382 F. Supp. 241 (D. Conn. 1974); Wiley v. United States Bd. of Parole, 380 F. Supp. 1194 (M.D. Pa. 1974); Barradale v. United States Bd. of Paroles & Pardons, 362 F. Supp. 338 (M.D. Pa. 1973).

Usually, due process has been held to require only that a prisoner be given a written statement of reasons for denial of parole. *See* Franklin v. Shields, 569 F.2d 800 (4th Cir. 1978) (per curiam) (en banc), *aff'g in part and rev'g in part* 569 F.2d 784 (4th Cir. 1977), *cert. denied,* 435 U.S. 1003

reasoned that the administrative burden on the state in providing access outweighs the potential benefits of access to the prisoner.[17]

In contrast to this judicial approach, this Note will contend that a prisoner should be permitted to inspect his file if it is to be considered by the parole board in deciding whether to grant parole. After a preliminary review of the parole release hearing in Part I, Part II will consider the threshold question of whether due process applies to the release hearing and conclude that it should. Part III will then examine the benefits and burdens of prisoner access and demonstrate that due process requires a right of inspection in order to avoid arbitrary and capricious denials of parole.

I. THE ROLE OF THE PRISONER'S FILE IN THE RELEASE HEARING

The primary purposes of parole are twofold: First, to help the prisoner reintegrate into society as soon as he is able, without being confined for the full term of his sentence; and second, to alleviate the cost of maintaining an individual in prison.[18] The determination of who should be granted parole and under what conditions is the function of the state board of parole.[19] Typically, the statutory guidelines set forth to aid the board are extremely broad. A majority of state statutes are modeled after the Standard Probation and Parole Act of the National Council on Crime and Delinquency, under which a parole board may grant parole if there is a "reasonable probability that the prisoner can be released without detriment to the community or to himself".[20]

The parole board's decision whether to grant or deny parole is usually made immediately after a parole release hearing.[21] The board's first decision in

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(1978); Williams v. Ward, 556 F.2d 1143 (2d Cir.), *cert. dismissed,* 434 U.S. 944 (1977); United States *ex rel.* Richerson v. Wolff, 525 F.2d 797 (7th Cir. 1975); Haymes v. Regan, 525 F.2d 540 (2d Cir. 1975); Childs v. United States Bd. of Parole, 511 F.2d 1270 (D.C. Cir. 1974); United States *ex rel.* Johnson v. Chairman of N.Y. State Bd. of Parole, 500 F.2d 925 (2d Cir.), *vacated as moot sub nom.* Regan v. Johnson, 419 U.S. 1015 (1974); Soloway v. Weger, 389 F. Supp. 409 (M.D. Pa. 1974); Johnson v. Heggie, 362 F. Supp. 851 (D. Colo. 1973).

17. *See* Franklin v. Shields, 569 F.2d 800, 801 (4th Cir. 1978) (per curiam) (en banc), *aff'g in part and rev'g in part* 569 F.2d 784 (4th Cir. 1977), *cert. denied,* 435 U.S. 1003 (1978); Williams v. Ward, 556 F.2d 1158-60 (2d Cir.), *cert. dismissed,* 434 U.S. 944 (1977).

18. Morrissey v. Brewer, 408 U.S. 471, 477-78 (1972).

19. *See generally* G. Killinger, H. Kerper & P. Cromwell, Probation and Parole in the Criminal Justice System 210 (1976).

20. National Council on Crime and Delinquency, Standard Probation and Parole Act § 18 (1955), *reprinted in* ABA Compendium of Correctional Legislation and Standards 111-37 (1972), *discussed in* Note, *Curbing Abuse in the Decision to Grant or Deny Parole,* 8 Harv. C.R.-C.L. L. Rev. 419, 428 (1973). The New York statute provides that the board must find that "there is reasonable probability that, if such prisoner is released, he will live and remain at liberty without violating the law, and that his release is not incompatible with the welfare of society." N.Y. Correc. Law § 213 (McKinney Supp. 1977-1978).

21. Only Georgia and Texas usually do not afford a prisoner a hearing when determining whether to grant or deny parole. V. O'Leary & K. Hanrahan, Parole Systems in the United States 31 (3d ed. 1976). In New York, the hearing is conducted by a three member panel of the parole board. A unanimous vote is required for parole to be granted. N.Y. Correc. Law § 214 (McKinney 1968 & Supp. 1977-1978).

many states, however, is whether to have a hearing at all. This decision is made after examination of the prisoner's files without any personal contact with the prisoner.[22] The file includes, among other items, the prisoner's presentence report, his physical, medical, and psychiatric reports, his criminal records, and a disciplinary report containing all infractions of prison rules.[23]

A prisoner's file assumes an even greater significance at the hearing itself. As a result of the large number of prisoners processed by the parole system,[24] the hearing is extremely brief[25] and thus often only a meaningless gesture by the parole board.[26] In New York, for example, two of the three board members are generally preoccupied in preparation for subsequent hearings, and usually just acquiesce in the recommendation of the one board member who has read the file of the prisoner under consideration.[27] In addition, if there is any questioning at all, it is usually superficial.[28] Thus, the information in the prison file may have more of an impact upon the parole board and its ultimate decision than the inmate himself.[29]

The prisoner may also have an interest in reviewing his file after the hearing. If parole has been denied the prisoner may seek a reconsideration only if the board's decision was "flagrant, unwarranted or unauthorized,"[30] or

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22. *See, e.g.*, Ala. Code § 15-22-25 (1975); Ga. Code Ann. § 77-516 (1973); Ky. Rev. Stat. § 439.340 (Supp. 1976).

23. *See, e.g.*, statutes cited note 22 *supra*. The file may also contain "the extent to which the prisoner has responded to efforts made to improve his mental and moral condition; his then attitude toward society, the judge who sentenced him, the district attorney who prosecuted him, and the policeman who arrested him; and his attitude toward his crime and his previous criminal career. The Board is also required to have before it a report from the superintendent of prison industries giving the prisoner's industrial record in prison, and a recommendation as to the kind of work he is best fitted to perform and at which he is most likely to succeed." Menechino v. Oswald, 430 F.2d 403, 405 (2d Cir. 1970), *cert. denied*, 400 U.S. 1023 (1971).

24. In New York, the parole board reviews 40 to 50 individuals in one day. United States *ex rel.* Johnson v. Chairman of N.Y. State Bd. of Parole, 500 F.2d 925, 932 (2d Cir.), *vacated as moot sub nom.* Regan v. Johnson, 419 U.S. 1015 (1974). Over 30 states equal or exceed the 15 hearings per day recommended by the American Correctional Association and the National Advisory Commission. V. O'Leary & K. Hanrahan, *supra* note 21, at 35.

25. In 1972, the average hearing in New York was 5.9 minutes. Attica Report, *supra* note 4, at 96. In 1973, the average hearing nationwide was just under 10 minutes. H. Burns, Corrections 293 (1975).

26. *See* Corrections, *supra* note 4, at 422-23. A prisoner does not have a due process right to be represented by counsel at the parole hearing. *See, e.g.*, Menechino v. Oswald, 430 F.2d 403 (2d Cir. 1970), *cert. denied*, 400 U.S. 1023 (1971). Approximately 21 jurisdictions permit representation by counsel at a hearing. Indigent defendants, however, are rarely represented as only six jurisdictions provide counsel for them. V. O'Leary & K. Hanrahan, *supra* note 21, at 39. A prisoner also does not have a due process right to call witnesses or produce favorable evidence at such hearings. *See, e.g.*, Menechino v. Oswald, 430 F.2d 403 (2d Cir. 1970), *cert. denied*, 400 U.S. 1023 (1971). Approximately 19 jurisdictions permit a prisoner to call witnesses. V. O'Leary & K. Hanrahan, *supra* note 21, at 39.

27. *See* Attica Report, *supra* note 4, at 96-97.

28. *Id.* at 96.

29. *See* H. Burns, *supra* note 25, at 295.

30. Scarpa v. United States Bd. of Parole, 477 F.2d 278, 283 (5th Cir.) (en banc), *vacated and remanded to consider mootness*, 414 U.S. 809 (1973).

if the board failed to comply substantially with its own guidelines.[31] The right to reconsideration is more apparent than real, however, because the prisoner, unaware of the information contained in his file, is in a poor position to contest the board's decision.[32]

Thus, at all stages of the parole release hearing—before, during, and after—a prisoner has a vital interest in inspecting the information in his file. If this information is misleading or inaccurate, the prisoner may be denied parole. Providing a prisoner with access to his file enables him to expose or rebut inaccurate information,[33] which may otherwise have contributed to an unfair denial of parole. As a result, many prisoners have alleged that due process entitles them to a right of inspection.[34] Before considering which procedural safeguards to implement at parole release hearings, however, it must first be determined whether the prisoner has a protectable interest in the hearing so as to warrant the protection of the due process clause.[35]

II. THE APPLICABILITY OF DUE PROCESS TO THE PAROLE RELEASE HEARING

A. *Due Process Application*

For many years due process was not considered applicable to either the process of granting parole[36] or the process of revoking a prisoner's parole already granted.[37] The prevalent view was that parole was a privilege extended by the state[38] and, as such, was outside the ambit of due process protection.[39] These decisions were consistent with the concept that the protection of the due process clause turned upon whether a governmental

31. Wagner v. Gilligan, 425 F. Supp. 1320, 1323 (N.D. Ohio 1977); Masiello v. Norton, 364 F. Supp. 1133, 1136 (D. Conn. 1973).

32. Although the prisoner must be informed of the reasons for the board's decision, N.Y. Correc. Law § 214(b) (McKinney Supp. 1977-1978), this information is of little help to the prisoner who seeks to challenge the board's decision. *See* notes 94-96 *infra* and accompanying text.

33. *See* pt. III(B)(1), (2) *infra*.

34. *See* cases cited note 16 *supra*.

35. *See* Board of Regents v. Roth, 408 U.S. 564 (1972); Goldberg v. Kelly,397 U.S. 254 (1970).

36. Menechino v. Oswald, 430 F.2d 403 (2d Cir. 1970), *cert. denied*, 400 U.S. 1023 (1971). In *Menechino*, the prisoner argued that a denial of his application for parole was unconstitutional because he had not been afforded certain procedural rights, including notice of the information to be considered by the board in determining his parole. The court rejected his contentions and stated two reasons why due process did not apply to a parole release hearing: First, the parole board's interest in the proceeding was not adverse to that of the prisoner, primarily because it is the board's interest to encourage and foster the prisoner's rehabilitation and readjustment into society; and second, the prisoner did not presently enjoy a protectable interest in the liberty of parole, since parole is a privilege extended by the state. *Id.* at 407-08.

37. *See, e.g.*, Mead v. California Adult Auth., 415 F.2d 767 (9th Cir. 1969); Rose v. Haskins, 388 F.2d 91 (6th Cir.), *cert. denied*, 392 U.S. 946 (1968); Hodge v. Markley, 339 F.2d 973 (7th Cir.), *cert. denied*, 381 U.S. 927 (1965); Jones v. Rivers, 338 F.2d 862 (4th Cir. 1964).

38. *E.g.*, Brown v. Kearney, 355 F.2d 199, 200 (5th Cir. 1966).

39. Menechino v. Oswald, 430 F.2d 403, 407-08 (2d Cir. 1970), *cert. denied*, 400 U.S. 1023 (1971).

benefit was characterized as a "right" or a "privilege".[40] Therefore, since parole was considered an "act of grace"[41] of the state, the state parole board could grant, revoke, or deny parole as it saw fit.

The right-privilege analysis, however, has been rejected by the Supreme Court.[42] An individual seeking to avail himself of due process protections must now establish that a liberty or property interest encompassed by the fourteenth amendment is involved.[43] Applying this standard, the Court, in *Morrissey v. Brewer,*[44] held that due process does apply to a parole revocation hearing. The Court, however, has yet to address the question of whether the prospect of liberty involved in a parole release hearing qualifies as a protectable interest. It is suggested that an inmate may establish a protectable interest in a release hearing by application of either one of two theories. The first theory centers upon the "conditional liberty" offered by parole, a concept first introduced in *Morrissey.*[45] The second theory originates from those state statutes that mandate that an inmate must be considered for parole after completion of a specified portion of his sentence.[46]

B. *Conditional Liberty*

In *Morrissey,* two prisoners had their parole revoked for violating the conditions of their parole, without being afforded a hearing.[47] The Court, distinguishing parole revocation from a criminal prosecution, rejected the prisoners' argument that they should be extended the full panoply of procedural rights.[48] Nevertheless, the Court found that the parolees had an interest in maintaining their "conditional liberty" which had been granted by the parole board.[49]

The Court stated that each "parolee has relied on at least an implicit promise that parole will be revoked only if he fails to live up to the parole conditions," and reasoned that "the liberty of a parolee, although indeterminate, includes many of the core values of unqualified liberty and its termination inflicts a 'grievous loss' . . . ."[50] Thus, the Court concluded that the

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40. *See* Escoe v. Zerbst, 295 U.S. 490 (1935); Ughbanks v. Armstrong, 208 U.S. 481 (1908).

41. Arketa v. Wilson, 373 F.2d 582, 585 (9th Cir. 1967).

42. *See, e.g.,* Board of Regents v. Roth, 408 U.S. 564, 571 (1972); Graham v. Richardson, 403 U.S. 365, 374 (1971). *See generally* Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law,* 81 Harv. L. Rev. 1439 (1968).

43. *See, e.g.,* Mathews v. Eldridge, 424 U.S. 319, 335 (1976); Morrissey v. Brewer, 408 U.S. 471, 481 (1972); Bell v. Burson, 402 U.S. 535, 539 (1971); Goldberg v. Kelly, 397 U.S. 254, 262 (1970); Sherbert v. Verner, 374 U.S. 398, 404 (1963).

44. 408 U.S. 471 (1972).

45. *See* pt. II(B) *infra.*

46. *See* pt. II(C) *infra.*

47. 408 U.S. at 472-74.

48. *Id.* at 480.

49. *Id.* at 482-84.

50. *Id.* at 482. The idea of an implied promise as the source of a protected interest is not new. In Connell v. Higginbotham, 403 U.S. 207 (1971), a public school teacher was dismissed from his job for failing to take a loyalty oath. The Court held that he was deprived of due process despite the fact that he was hired without tenure or a formal contract, because he was hired "with a

parolees were entitled to due process protection at their parole revocation hearing.[51]

The Fifth Circuit has declined to extend *Morrissey* to parole release hearings, reasoning that, in essence, there is no identity of interest between a parolee at a revocation hearing who faces termination of freedom presently enjoyed and a prisoner at a release hearing who has only the mere prospect of freedom.[52] The majority of courts, however, have properly rejected this narrow distinction, and have extended the *Morrissey* concept of conditional liberty to release hearings. These courts have reasoned that just as the parolee at a revocation hearing has an interest in maintaining his conditional liberty, the prisoner at the release hearing has an interest in achieving this same conditional liberty.[53] "To hold otherwise would be to create a distinction too gossamer-thin to stand close analysis. Whether the immediate issue be release or revocation, the stakes are the same: conditional freedom versus incarceration."[54]

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clearly implied promise of continued employment." Board of Regents v. Roth, 408 U.S. 564, 577 (1972) (construing *Connell*).

51. The due process requirements mandated by *Morrissey* were: (1) written notice of the claimed parole violations; (2) disclosure to the parolee of evidence against him; (3) the opportunity to be heard in person and to present witnesses and documentary evidence; (4) the right to confront and cross-examine adverse witnesses; (5) a neutral and detached hearing body such as a traditional parole board; and (6) a written statement by the fact finders as to the evidence relied upon and the reasons for revoking parole. 408 U.S. at 489.

52. Cruz v. Skelton, 543 F.2d 86 (5th Cir. 1976), *cert. denied*, 433 U.S. 911 (1977); Brown v. Lundgren, 528 F.2d 1050 (5th Cir.), *cert. denied*, 429 U.S. 917 (1976); Cook v. Whiteside, 505 F.2d 32 (5th Cir. 1974); Scarpa v. United States Bd. of Parole, 477 F.2d 278 (5th Cir.) (en banc), *vacated and remanded to consider mootness*, 414 U.S. 809 (1973).

In *Brown*, the court viewed parole as a privilege and reasoned that if the prisoner were denied parole, no "grievious loss" would occur. 528 F.2d at 1052-53. This analytical approach is misplaced in light of *Morrissey*'s clear language that whether a prisoner had a due process right in parole did not turn upon whether parole was considered a privilege. 408 U.S. at 481-82.

53. A number of cases which have extended due process to the release hearing have relied upon *Morrissey*. *See* Williams v. Ward, 566 F.2d 1143 (2d Cir.), *cert. dismissed*, 434 U.S. 944 (1977); United States *ex rel.* Richerson v. Wolff, 525 F.2d 797 (7th Cir. 1975), *cert. denied*, 425 U.S. 914 (1976); Haymes v. Regan, 525 F.2d 540 (2d Cir. 1975); Bradford v. Weinstein, 519 F.2d 728 (4th Cir. 1974), *vacated as moot per curiam*, 423 U.S. 147 (1975); Childs v. United States Bd. of Parole, 511 F.2d 1270 (D.C. Cir. 1974); United States *ex rel.* Johnson v. Chairman of N.Y. State Bd. of Parole, 500 F.2d 925 (2d Cir.), *vacated as moot sub nom.* Regan v. Johnson, 419 U.S. 1015 (1974); Cicero v. Olgiati, 410 F. Supp. 1080 (S.D.N.Y. 1976); Johnson v. Heggie, 362 F. Supp. 851 (D. Colo. 1973). Other courts extending due process to the release hearing have relied upon Wolff v. McDonnell, 418 U.S. 539 (1974), *discussed at* pt. II(C) *infra*, as the source of due process protection at the hearing. Franklin v. Shields, 569 F.2d 784 (4th Cir. 1977), *aff'd in part and rev'd in part per curiam on rehearing en banc*, 569 F.2d 800 (4th Cir.), *cert. denied*, 435 U.S. 1003 (1978); Soloway v. Weger, 389 F. Supp. 409 (M.D. Pa. 1974). These decisions, however, typically fail to define adequately the interest of the prisoner at the release hearing. It is, therefore, unclear what procedures would best protect the prisoner's interest.

54. United States *ex rel.* Johnson v. Chairman of N.Y. State Bd. of Parole, 500 F.2d 925, 928 (2d Cir.), *vacated as moot sub nom.* Regan v. Johnson, 419 U.S. 1015 (1974). The *Johnson* court, citing the large number of prisoners released on parole each year, stated that "the average prisoner, having a better than 50% chance of being granted parole before the expiration of his maximum sentence, has a substantial 'interest' in the outcome." *Id.; accord*, Bradford v.

The second element present in *Morrissey*, an implied promise by the state,[55] would also seem to be present in the release hearing context. In *Morrissey*, the implied promise was that the parolee, as long as he fulfilled the conditions of parole, would not be subjected to arbitrary and capricious actions by the state regarding his parole status.[56] In a release hearing, the implied promise is that an individual considered for parole, will be given a fair hearing. Thus, due process requires only that the parole board set up procedures which fairly determine, in light of all available information, whether parole should be granted.[57] Providing a prisoner with the right to inspect his files is an essential step in achieving such a fair determination.[58]

C. *Statutory Due Process Right*

State statutes governing the parole process provide another basis for concluding that due process is applicable to a parole release hearing. The Fourth Circuit recently relied upon this approach in *Franklin v. Shields*.[59] There, two prisoners were denied access to their files which were later used by the Virginia Probation and Parole Board in its decision to deny them parole.[60] They challenged the procedures employed by the board alleging, *inter alia*, that the board's denial of access to the files constituted a denial of procedural due process.[61] The district court held that due process required that a prisoner eligible for parole be afforded access to his files at a reasonable time prior to

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Weinstein, 519 F.2d 728 (4th Cir. 1974), *vacated as moot per curiam*, 423 U.S. 147 (1975); Childs v. United States Bd. of Parole, 511 F.2d 1270 (D.C. Cir. 1974).

In *Johnson*, the Second Circuit ultimately decided that the fourteenth amendment required that a prisoner must be given a written statement of the reasons for denial of his parole. 500 F.2d at 934. The court, however, was careful not to overrule its previous holding in Menechino v. Oswald, 430 F.2d 403 (2d Cir. 1970), *cert. denied*, 400 U.S. 1023 (1971), *discussed at* note 36 *supra*. It interpreted *Menechino* to hold simply that not all procedural due process rights attach to a release hearing. Thus, *Menechino*, it said, permitted an individual approach to procedures requested at a parole hearing. 500 F.2d at 926-28.

55. *See* notes 47-50 *supra* and accompanying text.

56. 408 U.S. at 484.

57. This would be totally consistent with *Morrissey*: "What is needed is an informal hearing structured to assure that the finding of a parole violation will be based on verified facts and that the exercise of discretion will be informed by an accurate knowledge of the parolee's behavior." *Id.* at 484.

It is suggested that a fair parole release hearing could be achieved by application of the second, third, and sixth of the *Morrissey* procedures. *See* note 51 *supra*. Application of the second and third procedures, which provided that the parolee must be informed of the evidence against him before his hearing and that he had a right to be heard in person concerning the evidence, could best be effected by giving a prisoner access to his file. This would also allow a prisoner to prepare for his hearing and to make an affirmative case for parole at the hearing. Application of the sixth procedure, which provided that the parolee must be given a written statement explaining the basis of the board's actions, would be consistent with the prisoner's right to be given a statement of the reasons why parole was denied. *See* note 54 *supra*.

58. *See* pt. III *infra*.

59. 569 F.2d 784 (4th Cir. 1977), *aff'd in part and rev'd in part per curiam on rehearing en banc*, 569 F.2d 800, 801 (4th Cir.), *cert. denied*, 435 U.S. 1003 (1978).

60. *Id.* at 787.

61. *Id.*

his parole hearing.[62] The court, however, failed to specify the source of the prisoner's interest that triggered the application of due process.[63]

The Fourth Circuit's affirmance provided the missing source.[64] The court found that a liberty interest was created by the statute which established a right to be considered for parole after completion of a specified portion of the prison sentence.[65] Thus, instead of a broad ruling that due process is applicable whenever a prisoner is considered for parole, the court held that due process applies only when the prisoner's consideration for parole is mandated by statute.[66]

In support of the statutory right approach the *Franklin* court relied on *Wolff v. McDonnell.*[67] There, the Supreme Court held that statutorily created good-time credits, which shortened the amount of time a prisoner had to serve before he became eligible for parole, could not be revoked without a hearing.[68] *Wolff* turned not on any inherent right of the prisoner to the good-time credits but rather on the inability of the state to revoke unilaterally the good–time credit—a concept which the state had created—without some kind of fair proceeding.[69]

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62. 399 F. Supp. 309, 316-17 (W.D. Va. 1975). The district court also held that due process required that the board publish standards and criteria for granting parole, that each prisoner being considered for parole have a personal hearing before the board, and that a written statement of reasons be given by the board when denying a prisoner parole. *Id.* at 313-318.

63. The district court relied on Bradford v. Weinstein, 519 F.2d 728 (4th Cir. 1974), *vacated as moot per curiam,* 423 U.S. 147 (1975), in which the Fourth Circuit had held that due process did apply to a parole release hearing but remanded for consideration of the extent of procedures required at the hearing. Commentators have stated that *Weinstein* stands for the proposition that due process attaches by reason of the "conditional liberty" of parole. *See* Note, *The Applicability of Due Process and State Freedom of Information Acts to Parole Release Hearings,* 27 Syracuse L. Rev. 1011, 1020 (1976). In light of the court's discussion of Wolff v. McDonnell, 418 U.S. 539 (1974), *discussed at* notes 67-69 *infra* and accompanying text. However, *Weinstein* would also seem to support the idea that a due process right attaches by virtue of the state parole statute.

64. Franklin v. Shields, 569 F.2d 784 (4th Cir. 1977). The court had consolidated *Franklin* with Williams v. Virginia Probation & Parole Bd., 401 F. Supp. 1371 (W.D. Va. 1975), which in reliance on the district court decision in *Franklin,* had required that a prisoner be given access to his file.

65. "The prisoner's interest in these proceedings is the present right to be considered for parole, a right created by Virginia law." 569 F.2d at 788. The Virginia statute provided, with certain exceptions, that prisoners were eligible for parole after serving one-fourth of their term or twelve years of their sentence, whichever was less. Va. Code § 53–251 (Supp. 1976).

66. On rehearing en banc, however, the Fourth Circuit reversed its holding that due process required that a prisoner be given access to his files. The court, without referring to the statutory right theory, affirmed that part of the decision which had held that due process did apply to the release hearing. Franklin v. Shields, 569 F.2d 800 (4th Cir. 1978), (per curiam) (en banc), *aff'g in part and rev'g in part,* 569 F.2d 784 (4th Cir. 1977), *cert. denied,* 435 U.S. 1003 (1978).

67. 418 U.S. 539 (1974).

68. *Id.* at 557-58. In *Wolff,* the credits had been revoked for alleged disciplinary violations. *Id.* at 555. These good-time credits which were given to a prisoner for good behavior could be revoked, without a hearing, for serious disciplinary violations. *Id.* at 547-53.

69. The *Wolff* Court, however, did not afford the prisoner a full range of procedural safeguards. The Court held that: (1) a prisoner has no constitutional right to confront and cross-examine adverse witnesses at prison disciplinary proceedings, such procedures being discretionary with the prison officials, *id.* at 567-69; and (2) the prisoner has no right to retained

The *Franklin* court would seem to be correct in extending the *Wolff* reasoning to the parole release hearing. A prisoner has no right to either good-time credits or parole. Both are created by state law, however, and both affect a prisoner's liberty. As such, both involve a protectable interest that the state cannot arbitrarily revoke or withhold.

Although the Supreme Court has recently rejected due process claims by prisoners alleging a statutory right theory, these decisions do not affect the application of the theory at a parole release hearing. In both *Meachum v. Fano*[70] and *Montanye v. Haymes*,[71] prisoners alleged that absent an adequate fact finding hearing, they had an interest in remaining in their present correctional facility, rather than being transferred to one where the conditions were less favorable.[72] The prisoners were transferred to maximum security prisons on the basis of the prison officials' belief that they were engaging in conduct detrimental to maintenance of prison discipline.[73]

In both cases the court held that neither prisoner could show a protectable interest because, unlike *Wolff*, the statutes involved created no expectation that the prisoner was entitled to serve his sentence at one correctional institution rather than another.[74] This reasoning is inapplicable to parole release hearings. Those statutes that form the basis of the statutory right theory typically mandate that a prisoner be considered for parole after serving a specified portion of his sentence.[75] Unlike the prisoners in *Meachum* and *Montanye*, who did not have a statutory right to serve their sentence in one particular institution, prisoners governed by these parole statutes have a statutory right to be considered for parole.[76]

The statutory right theory, however, is of limited use. First, not all states

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or appointed counsel in such proceedings, although counsel substitutes should be provided in certain cases. *Id.* at 569-70. The Court held that due process required only that the prisoner be provided: (1) advance written notice of the charges no less than 24 hours before his appearance, *id.* at 563-64; (2) an opportunity to call witnesses and present documentary evidence in his defense if permitting him to do so would not jeopardize institutional safety or correctional goals, *id.* at 566-67; and (3) a written statement as to the evidence relied upon and the reasons for the disciplinary action. *Id.* at 565.

In limiting the extent of due process, *Wolff* attempted to balance the prisoner's needs against the prison administration's desires to maintain proper disciplinary proceedings by ensuring "swift and sure" punishment for those who have broken the rules. *Id.* at 572. This interest in proper disciplinary proceedings, however, should not be used to restrict the extent of due process in a parole release hearing. There, "the purpose of the proceeding is not to determine punishment; rather it is to determine if the prisoner has been rehabilitated enough as to be conditionally released back into society." Rosenthal, *Due Process for Prisoners Facing Parole Boards*, 21 Am. Trial Law. A. L. Rep. 213 (1978).

70. 427 U.S. 215 (1976).

71. 427 U.S. 236 (1976).

72. Montanye v. Haymes, 427 U.S. at 242; Meachum v. Fano, 427 U.S. at 224.

73. Montanye v. Haymes, 427 U.S. at 237-39; Meachum v. Fano, 427 U.S. at 216-21.

74. Montanye v. Haymes, 427 U.S. at 243 (construing N.Y. Correc. Law § 23(1) (McKinney Supp. 1975-1976)), Meachum v. Fano, 427 U.S. at 226-27 (construing Mass. Ann. Laws ch. 127, § 97 (Michie/Law. Co-op Supp. 1972)).

75. *See* note 7 *supra*.

76. For a list of states where a prisoner must be considered for parole after serving a specified portion of his sentence, see note 7 *supra*.

provide that a prisoner will be considered for parole after a specified period of time.[77] For example, in Alabama and Connecticut, the determination of whether an individual should be considered for parole is made by the board itself after reviewing the prisoner's files.[78] Thus, a prisoner in these states would be unable to establish a statutory right to a fair parole hearing. In addition, the statutory right theory may provide only limited due process protection. Because the theory emphasizes a state-created right, it can be argued that the state legislature did not intend to burden the state with a series of expensive and cumbersome procedures.[79] The conditional liberty theory, on the other hand, is a broader approach in that it emphasizes the prisoner's right to a fair hearing. It offers a prisoner seeking access to his file a better chance of success than the statutory right theory because it applies whether or not the prisoner's consideration for parole is mandated by statute.

III. COMPETING INTERESTS: BURDEN VERSUS BENEFITS

A. *Burden Upon the State*

The mere application of due process to the release hearing, of itself, does not guarantee a prisoner the right to inspect his file. Determination of the specific procedures which are engendered by due process requires a court to balance the private interest affected against the government's interest in avoiding burdensome administrative procedures.[80] In the case of access to parole files, the courts have typically denied prisoner's requests.[81] Invariably, the courts have concentrated their analysis on the burden placed upon the state by having to provide access, without adequately considering the possible benefits to be gained by providing access.[82]

Williams v. Ward[83] is a classic example of the judicial emphasis on administrative convenience. In *Williams*, the court held that due process does not mandate that a prisoner be granted access to his files, absent a showing that access is necessary to ensure that the board relies on neither an impermissible factor nor false information contained in the files.[84] This standard,

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77. For a list of states where consideration for parole is at the discretion of the board, see note 7 *supra*.

78. Ala. Code § 15-22-15 (1975); Conn. Gen. Stat. Ann. § 54-125 (West Supp. 1978).

79. In the Fourth Circuit's first consideration of *Franklin*, 569 F.2d 784 (4th Cir. 1977), *discussed at* notes 59-66 *supra* and accompanying text, Judge Field was opposed to granting access to prison files because it would place a burden upon the state which was not outweighed by the potential benefits inuring to the inmate if he were permitted to inspect his file. *Id.* at 798-800 (Field, J., dissenting). On rehearing, Judge Field's position was adopted by the Fourth Circuit. 569 F.2d 800 (4th Cir. 1977), *cert. denied*, 435 U.S. 1003 (1978).

80. *See, e.g.*, Mathews v. Eldridge, 424 U.S. 319, 333 (1976); Goldberg v. Kelly, 397 U.S. 254, 263 (1970); Bradford v. Weinstein, 519 F.2d 728, 733 (4th Cir. 1974), *vacated as moot per curiam*, 423 U.S. 147 (1975).

81. *See* cases cited note 16 *supra*.

82. *See, e.g.*, Williams v. Ward, 556 F.2d 1143 (2d Cir.) (access would serve little benefit to prisoner who knows of adverse information contained therein), *cert. dismissed*, 434 U.S. 944 (1977); Holup v. Gates, 544 F.2d 82 (2d Cir. 1976) (no evidence that access will have a positive impact on the release hearing), *cert. denied*, 430 U.S. 941 (1977).

83. 556 F.2d 1143 (2d Cir.), *cert. denied*, 434 U.S. 944 (1977).

84. *Id.* at 1160-61.

however, is somewhat illusory because the prisoner who has never seen his parole file is in a poor position to challenge the accuracy of the information therein.[85] The *Williams* court went on to suggest, in dictum, that even if a proper showing were made, access might be denied because of the burden placed upon the state if it were forced to provide large numbers of prisoners with copies of their files.[86]

This, however, was the same fear expressed on the federal level[87] before the United States Parole Commission permitted federal prisoners to inspect their files before their release hearing.[88] To a large extent, this fear has proved unfounded.[89] The adoption of effective administrative procedures would lessen, to a great extent, the burden attendant upon providing prisoner access.[90]

B. *Benefits of Access*

1. Exposure of Inaccurate Information

As a result of the large number of prisoners processed by a parole board[91] and the various types of information contained in a prisoner's file,[92] the file may contain erroneous information.[93] Allowing a prisoner to inspect his files

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85. *Id.* at 1160. The plaintiff in *Williams,* after having been denied parole, sought the discovery of certain adverse information contained in his parole file and an opportunity to rebut the evidence at a new release hearing. The information concerned the plaintiff's mental condition and stemmed, in part, from two threatening letters that the plaintiff had written to the judge who had sentenced him. *Id.* at 1145. The court held that the plaintiff could show no prejudice in having been denied his file since he already knew the existence of this adverse information. *Id.* at 1161.

86. *Id.* at 1160.

87. *See* note 16 *supra.*

88. *See* note 11 *supra.*

89. Interview with Anthony Cappizzi, Supervisor, United States Probation and Parole Office for the Eastern District of New York (Oct. 18, 1978); Interview with Harry G. Sydor, Deputy Chief, United States Probation and Parole Office for the Southern District of New York (Oct. 18, 1978).

90. For example, under the federal system a copy of the prisoner's file is kept at both the institution where the prisoner is incarcerated and the parole board within the district where the defendant was sentenced. Approximately 45 days before his scheduled parole hearing a prisoner may make a request to see his files. The parole board will then make the determination whether to grant access, and if access is granted, what if anything will be kept from the prisoner to protect the safety of both the individual prisoner and those who have contributed to the information contained in the file. However, any item denied the prisoner is in turn kept from the parole board at the prisoner's hearing.

If access is granted, and in almost all cases it is, the prisoner will be allowed to inspect his file in the presence of a prison official 30 days before his hearing. The prisoner may take notes but he is not permitted to make a copy and will not be given access to his files again prior to his parole hearing. The prisoner usually spends, on the average, 45 minutes with his file. Interview with Anthony Cappizzi, Supervisor, United States Probation and Parole Office for the Eastern District of New York (Oct. 18, 1978); Interview with Harry G. Sydor, Deputy Chief, United States Probation and Parole Office for the Southern District of New York (Oct. 18, 1978).

91. *See* note 24 *supra.*

92. *See* note 23 *supra* and accompanying text.

93. *See* cases cited note 12 *supra.*

and thereby expose any inaccuracies would ensure that the board does not consider erroneous information in deciding whether to grant or deny parole. Nevertheless, courts have held that due process requires only that the parole board provide the prisoner with a written statement of the reasons underlying its decision to deny parole.[94] In so doing, courts have, in effect, stated that a protectable interest worthy of procedural safeguards does not arise until after parole has been denied. This has been aptly described as "locking the barn door after the horse is stolen".[95]

This ex post facto protection is cold comfort to a prisoner denied parole who has lost his chance to expose inaccuracies in his parole files, and who therefore must wait in prison pending an appeal or reconsideration of his case.[96] Moreover, because the board's written statement of the reasons for denial of parole may not refer to the false information, the prisoner may never have a chance to appeal the board's decision. Consequently, because most states do not have a procedure to ensure that the material contained in parole files is accurate,[97] the prisoner is best equipped to discover inaccurate information[98] and minimize its prejudicial impact on the parole board.[99]

2. Opportunity To Rebut

The second benefit of providing access is that it would allow the prisoner the opportunity to rebut adverse information contained in his files or possibly to explain this information to the parole board. Although parole is considered a nonadversarial proceeding[100] because the board determines only whether a prisoner is capable of reentering society,[101] parole boards have traditionally required prisoners to make an affirmative case for parole.[102] Thus, a prisoner would be severely hampered if he is deprived before the hearing of the information that will be considered by the board in making its decision.[103]

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94. *See* note 16 *supra.*

95. Franklin v. Shields, 569 F.2d 784, 793 (4th Cir. 1977), *aff'd in part and rev'd in part per curiam on rehearing en banc,* 569 F.2d 800 (4th Cir.), *cert. denied,* 435 U.S. 1003 (1978).

96. *See* Rosenthal, *supra* note 69, at 215.

97. *See* Note, *Procedural Due Process in Parole Release Proceedings—Existing Rules, Recent Court Decisions, and Experience in the Prison,* 60 Minn. L. Rev. 341, 362 (1976).

98. "Since the data on which the Board acts is not developed through an open adversary confrontation, its accuracy cannot be assured unless the prisoner has access to the relevant information in his file." Franklin v. Shields, 569 F.2d 784, 794-95 (4th Cir. 1977) (footnote omitted) *aff'd in part and rev'd in part per curiam on rehearing en banc,* 569 F.2d 800 (4th Cir.), *cert. denied,* 435 U.S. 1003 (1978).

99. "Regardless of the particular concerns of the parole board or factors considered in selecting inmates for release, a full range of information related to the inmate is required for decisionmaking. For sound decisionmaking, the information must be accurate as well as complete." G. Killinger, H. Kerper & P. Cromwell, *supra* note 19, at 251. *See also* L. Carney, *supra* note 2, at 67-69.

100. Hyser v. Reed, 318 F.2d 225, 237 (D.C. Cir.), *cert. denied,* 375 U.S. 957 (1963).

101. *See, e.g.,* Menechino v. Oswald, 430 F.2d 403, 405 (2d Cir. 1970), *cert. denied,* 400 U.S. 1023 (1971).

102. *See* Corrections, *supra* note 4, at 423.

103. This is further compounded by the fact that a prisoner cannot produce favorable witnesses or cross-examine those who have provided adverse information to the parole board. *See* note 26 *supra.*

Nevertheless, courts have denied prisoners an opportunity to rebut negative information. In *Williams v. Ward,*[104] for example, the prisoner sought access to his psychiatric file which contained reports stemming from a letter the prisoner had written to his sentencing judge.[105] The court denied the prisoner access to his files, reasoning that since the prisoner knew that the psychiatric files existed it would be of no benefit to him to know their contents.[106]

This analysis, however, overlooks the fact that the prisoner sought access to his files to rebut the conclusions drawn about his behavior and consequent eligibility for parole as a result of the letter. Manifestly, a person cannot adequately refute adverse material simply by knowing it exists; he must also know what the adverse information is.[107] Providing a prisoner with access to his files would allow him the opportunity to rebut conclusions that the board might otherwise draw.

3. Prisoner Perception of Parole

A common complaint of prisoners is that the parole system does not deal openly and fairly with each prisoner.[108] Because the interest of the prisoner in the outcome of parole is so great, permitting him to inspect his parole file and to interact with the parole board concerning information therein would demonstrate to the prisoner that parole operates to release those prisoners most likely to benefit from release and that decisions regarding parole are not made arbitrarily.[109] This could alleviate some of the prisoner's doubts concerning the parole system.

CONCLUSION

A basic premise of each parole release is that the parolee will not return to prison. Because of the extreme overcrowding[110] and often volatile situations

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104. 556 F.2d 1143 (2d Cir.), *cert. dismissed,* 434 U.S. 944 (1977), *discussed at* notes 82-86 *supra* and accompanying text.

105. *Id.* at 1145.

106. *Id.* at 1160-61.

107. Due process has mandated that a party be given access to pertinent files prior to an administrative hearing. In Escalera v. New York Hous. Auth., 425 F.2d 853 (2d Cir.), *cert. denied,* 400 U.S. 853 (1970), the court held that denying a tenant access to materials in his folder, when the entire folder is considered by the Housing Authority in an eviction proceeding, deprives the tenants of due process. *Id.* at 862. The court stated: "A hearing at which the tenant can rebut evidence against him would be of little value if the [Housing Authority's] ultimate decision can rest on items in the tenant's folder of which he has no knowledge and hence has had no opportunity to challenge." *Id.* (citations omitted).

Similarly, in Violi v. Reese, 343 F. Supp. 462 (E.D. Pa. 1972), the court held that a serviceman seeking discharge as a conscientious objector had a due process right to inspect his entire file and a right to reply in writing to any adverse evidence contained therein before his file was forwarded to the Chief of Naval Personnel. *Id.* at 467-68.

108. "A federal prisoner recently told us that discriminatory granting of paroles is the 'greatest source of bitterness in the entire system.' " R. Goldfarb & L. Singer, After Conviction 281 (1973). *See also* H. Abadinsky, *supra* note 1, at 177; L. Carney, *supra* note 2, at 199.

109. *See* Attica Report, *supra* note 4, at 97-98.

110. At present the prisons are extended beyond their maximum capacity with overcrowding. N.Y. Times, Aug. 6, 1978, § 1, at 1, col. 1. The purpose of providing prisoners with access is to ensure that the board reaches informed decisions. Better parole decisions could achieve one of the

in our nation's prisons, informed parole release decisions are a necessity. Permitting a prisoner to inspect his parole file will not only result in fair and nonarbitrary parole hearings, but will also engender informed release decisions, and thus reduce the rate of recidivism. Moreover, this would not only serve society's interest in the efficient administration of parole, but also its interest in the prisoner's return to society to pursue a "normal and useful life."[111]

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major purposes of parole: the return of a prisoner to society with the idea that he will not return to prison. *See generally* Rosenthal, *supra* note 69, at 215.

111. Morrissey v. Brewer, 408 U.S. 471, 484 (1972).